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Case No. 57087-4-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

IAN MUNCE,

Petitioner,

v.

CITY OF ANACORTES and GROWTH MANAGEMENT
HEARINGS BOARD,

Respondents.

***AMICUS CURIAE* BRIEF OF FUTUREWISE**

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I. INTRODUCTION

This proposed *amicus curie* brief analyzes the Growth Management Act's (GMA) public participation requirements and the requirements for critical areas ordinances. This proposed *amicus curie* brief also argues that the adoption of the Anacortes critical areas ordinance¹ violated the public participation requirements of the GMA and did not incorporate best available science (BAS).

Futurewise filed and served a Motion for Extension of Time to File and Serve Amicus Curiae Motion and Brief and Motion For Permission to File an Amicus Curiae Brief under Case No. 39503-1-III on February 10, 2023. Leave to file the

¹ City of Anacortes Ordinance No. 3064 which adopted the new critical areas regulations refers to them as critical areas regulations (see Certified Growth Management Hearings Board Administrative Record [CR] 001361). However, most of the record refers to the regulations as a critical areas ordinance or (CAO). So, this brief refers to them as a critical areas ordinance or CAO.

amicus curiae brief was conditionally granted on February 23, 2023.²

II. IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Applicant Futurewise, a nonprofit corporation, is a statewide organization interested in the efficient management of growth in the State of Washington, the effective implementation of the Washington Growth Management Act (“GMA”), and the protection of critical areas including wetlands. Applicant Futurewise works throughout Washington State to support land-use policies that encourage healthy, equitable and opportunity-rich communities, and that protect our most valuable farmlands, forests, and water resources. Applicant Futurewise closely follows the implementation of the GMA and the adoption of local comprehensive plans and development regulations. The Applicant Futurewise also participates in litigation to both enforce the GMA and to

² Notation Ruling By Commissioner Triebel in Case No. 57087-4-II, *Ian Munce v. City of Anacortes* (Feb. 23, 2023).

address the proper interpretation of the state’s land use laws including the GMA. The Applicant Futurewise understands the impact that the loss of wetlands has on water quality, water quantity, and fish and wildlife including threatened and endangered salmon and orcas.

III. STATEMENT OF THE CASE

Futurewise relies on the statement of the case in Munce’s Petitioner’s Brief.

IV. ARGUMENT

A. Principles of Statutory Interpretation.

“‘The primary goal in statutory interpretation is to ascertain and give effect to the intent of the Legislature.’ In order to determine legislative intent, the court begins with the statute’s plain language and ordinary meaning.”³ Courts “may discern the plain meaning of nontechnical statutory terms from their

³ *King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (Soccer Fields)*, 142 Wn.2d 543, 555, 14 P.3d 133, 139 (2000) citations omitted.

dictionary definitions.”⁴ When interpreting the GMA, it is read as a whole.⁵ “The Board’s interpretation of the GMA is not binding on the courts.”⁶

B. Principles for Interpreting Local Ordinances and Codes.

This Court has concluded that:

We interpret local ordinances and codes as we interpret statutes, employing the general rules of statutory construction. *Neighbors of Black Nugget Rd. v. King County*, 88 Wn. App. 773, 778, 946 P.2d 1188 (1997), review denied, 135 Wn.2d 1003, 959 P.2d 126 (1998). As with statutes, we must ascertain and carry out the intent and purpose of the local legislative body promulgating a local ordinance or code. *Neighbors*, 88 Wn. App. at 778, 946 P.2d 1188. To determine legislative intent, we look first to the plain language of the ordinance. *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002).⁷

⁴ *State v. Kintz*, 169 Wn.2d 537, 547, 238 P.3d 470, 475 (2010).

⁵ *Soccer Fields*, 142 Wn.2d at 560, 14 P.3d 133 at 142.

⁶ *Spokane Cnty. v. E. Washington Growth Mgmt. Hearings Bd.*, 188 Wn. App. 467, 481, 353 P.3d 680, 686 (2015).

⁷ *Washington Shell Fish, Inc. v. Pierce Cnty.*, 132 Wn. App. 239, 253-54, 131 P.3d 326, 333 (2006) review denied *Washington Shell Fish, Inc. v. Pierce Cnty.*, 158 Wn. 2d 1027, 152 P.3d 347 (2007).

C. Whether the amendments made after the close of the public comment periods complied with the Growth Management Act's (GMA) public participation requirements. (Munce Issue 1)

The court of appeals held that “[c]itizen participation is a core goal of the GMA. RCW 36.70A.020(11).”⁸ Whether a modification to a comprehensive plan or development regulation amendment adopted without notice to the public constitutes a change requiring public notice under RCW 36.70A.035(2)(a) is a question of law.⁹

Comprehensive plan and development regulation amendments, including amendments to CAOs, must be adopted in compliance with the GMA’s public participation requirements.¹⁰

⁸ *Spokane Cnty. v. E. Washington Growth Mgmt. Hearings Bd.*, 188 Wn. App. 467, 490, 353 P.3d 680, 690 (2015).

⁹ *Spokane Cnty.*, 188 Wn. App. at 483, 353 P.3d at 686.

¹⁰ RCW 36.70A.035; RCW 36.70A.140; RCW 36.70A.030(8) “ ‘Development regulations’ or ‘regulation’ means the controls placed on development or land use activities by a county or city, including, but not limited to, ... critical areas ordinances”

RCW 36.70A.035(2) requires that:

(2)(a) Except as otherwise provided in (b) of this subsection, if the legislative body for a county or city chooses to consider a change to an amendment to a comprehensive plan or development regulation, and the change is proposed after the opportunity for review and comment has passed under the county's or city's procedures, an opportunity for review and comment on the proposed change shall be provided before the local legislative body votes on the proposed change.

(b) An additional opportunity for public review and comment is not required under (a) of this subsection if:

- (i) An environmental impact statement has been prepared under chapter 43.21C RCW for the pending resolution or ordinance and the proposed change is within the range of alternatives considered in the environmental impact statement;
- (ii) The proposed change is within the scope of the alternatives available for public comment;
- (iii) The proposed change only corrects typographical errors, corrects cross-references, makes address or name changes, or clarifies language of a proposed ordinance or resolution without changing its effect;
- (iv) The proposed change is to a resolution or ordinance making a capital budget decision as provided in RCW 36.70A.120; or
- (v) The proposed change is to a resolution or ordinance enacting a moratorium or interim control adopted under RCW 36.70A.390.

In the *Spokane County* decision, Spokane County increased its projected 20-year population growth within the urban growth area (UGA) from 113,541 to 121,112.¹¹ This change was made after the public comment period had been completed.¹² The population projection is used, among other purposes, to size urban growth areas (UGA) adopted in the comprehensive plan.¹³ “[T]he County’s unilateral adoption of an increased population projection, which was used to justify a significant expansion of the UGA, constituted a significant change, mandating public review and comment as provided in RCW 36.70A.035(2)(a).”¹⁴ The County did not provide a notice to public that it was considering the increased UGA population projection.¹⁵

¹¹ *Spokane Cnty.*, 188 Wn. App. at 474, 353 P.3d at 682.

¹² *Spokane Cnty.*, 188 Wn. App. at 474, 483, 353 P.3d at 682, 686.

¹³ *Spokane Cnty.*, 188 Wn. App. at 474, 484, 486, 353 P.3d at 682, 688, 687.

¹⁴ *Spokane Cnty.*, 188 Wn. App. at 487, 353 P.3d at 688.

¹⁵ *Spokane Cnty.*, 188 Wn. App. at 472, 353 P.3d at 681.

The County had studied five alternatives for the UGA including a no action, no expansion alternative.¹⁶ Using the UGA population growth projection of 113,541, “all five alternatives showed a population capacity surplus, meaning that there was no need to expand the UGA.”¹⁷ The Board and Court “rejected the County’s argument that it was a logical inference that some of the five alternatives under consideration would require an increase in the projected population growth, finding that it was an equally valid inference that the alternatives that resulted in excess urban population capacity would lead the County to reject the expansion of the UGA.”¹⁸

The County also argued that the update had been “subject to extensive public participation.”¹⁹ But there was “no evidence in the record that the County had considered a change in the

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Spokane Cnty.*, 188 Wn. App. at 478, 353 P.3d at 684.

¹⁹ *Spokane Cnty.*, 188 Wn. App. at 482, 353 P.3d at 686.

population projection until after it expanded the UGA boundary and the period for comment and review had passed.”²⁰

In this appeal, the June 2, 2021, version of the draft CAO deleted the part of proposed Anacortes Municipal Code (AMC) 19.70.020A that provided that the City of Anacortes’ Critical Areas Maps are adopted by reference.²¹ This amendment also added that “[t]he City Geographic Information Systems office must maintain an interactive, publicly available online map containing the location of known and potential critical areas, and must make pdf maps available to the public upon request.”²² The totality of the amendments to the June 2, 2021, version of AMC 19.70.020A provide as follows with the additions underlined and the deletions struck through:

A. Critical Areas Maps. The general locations of many critical areas in Anacortes are displayed on the City of Anacortes’ Critical Areas Maps; ~~which are hereby adopted by reference.~~ The

²⁰ *Spokane Cnty.*, 188 Wn. App. at 488, 353 P.3d at 689.

²¹ Certified Growth Management Hearings Board Administrative Record (CR) 001265.

²² CR 001265.

maps are used to alert the public of the potential location of critical areas in Anacortes. As new environmental information related to critical areas becomes available, the City is authorized to make changes as necessary to the Critical Areas Maps. The City Geographic Information Systems office must maintain an interactive, publicly available online map containing the location of known and potential critical areas, and must make pdf maps available to the public upon request.²³

This version was adopted by Ordinance No. 3064 as amended AMC 19.70.020A.²⁴ The City of Anacortes' Critical Areas Maps include a wetland map.²⁵

The deletion of the adoption by reference had not been proposed in the July 20, 2017, May 2, 2019, or January 2, 2021 drafts.²⁶ The City wrote in its Respondent's Response to Petitioner Munce's Dispositive Motion on Notice and Public

²³ CR 001265.

²⁴ CR 001370-71.

²⁵ CR 001402.

²⁶ CR 001005-06 (July 20, 2017, Draft. In this draft the amended subsection was proposed as AMC 19.70.025A); CR 000963 (May 2, 2019, Draft); CR 001164 (January 2, 2021, Draft). Also see the helpful side-by-side comparison prepared by the City Attorney at CR 007177.

Participation that “[t]he public had an opportunity to comment on Drafts 1 [July 20, 2017, Draft], 2 [May 2, 2019, Draft], and 3.1 [January 2, 2021, Draft].²⁷ The June 2, 2021 draft was released after the closed of the public comment period.²⁸

The City of Anacortes Critical Areas Ordinance Revision/Update Best Available Science updates recommendations report indicated that the purpose of critical areas ordinance maps is to “provide city staff, the applicant and professional report preparer with the” best available science they contain.²⁹ Ordinance No. 3064 states “[t]he maps are used to alert the public of the potential location of critical areas in Anacortes.”³⁰

The amendments to AMC 19.70.20A had the effect of changing the critical areas maps from maps that are adopted by reference and, therefore must be amended by ordinance, to

²⁷ CR 007164.

²⁸ CR 007267.

²⁹ CR 003980.

³⁰ CR 001370.

maps that can be updated by staff without public notice or public comment.³¹ So a wetland may be mapped on a property without the public and the owner knowing it happened. Similarly, a wetland may be deleted from a site without the public or the owner knowing it happened. Once deleted from the map, the conservation of the wetlands or critical area becomes less certain.

Adopted AMC 19.70.20B provides:

Regardless of whether a critical area is shown on the Critical Areas Map, the actual presence or absence of the features defined in this code as critical areas will govern. Prior to acting on any development permit the City may require an applicant to submit technical information to indicate whether critical areas actually exist on or adjacent to the applicant's site based on the definitions of critical areas in this code. This will be administered as a critical area identification form (AMC 19.70.110) included with appropriate permit forms.³²

³¹ CR 001370-71.

³² CR 001371.

Adopted AMC 19.70.20B provides that “the City may require an applicant to submit technical information to indicate whether critical areas actually exist on or adjacent to the applicant’s site”³³ The term “may” is discretionary and is not a mandatory requirement.³⁴ Submitting this information is not required for all developments.³⁵ This discretion makes sense only if the City has accurate critical areas maps. Public notice and an opportunity to comment on map changes helps make the maps more accurate. By no longer adopting critical areas maps by reference, but instead only requiring the maps to be maintained by the City Geographic Information Systems office means this critical accuracy check is gone.³⁶

Like the substantive population change that impacted the comprehensive plan in the *Spokane County* decision, this

³³ CR 001371 underlining added.

³⁴ *Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844, 848 (2005).

³⁵ CR 001370-71.

³⁶ CR 001265.

change has a substantive impact on the critical areas and the critical areas ordinance. Like *Spokane County* population projection amendment, the Anacortes amendment deleting the adoption by reference requirement had not been proposed in the July 20, 2017, May 2, 2019, or January 2, 2021 drafts.³⁷ Like *Spokane County* changes, the City should have provided the public with notice and an opportunity to comment. Failing to do so violates RCW 36.70A.035(2).

The Growth Management Hearings Board wrote that:

Munce is correct, and the City acknowledges that the addition of the language in Draft 3.2 of the Critical Areas Ordinance that reads “[t]he City Geographic Information Systems office must maintain an interactive, publicly available online map containing the location of known and potential critical areas, and must make pdf maps available to the public upon request” was added to that particular section of the draft after opportunities for public comment were over. However, this language was apparently added

³⁷ CR 001005-06 (July 20, 2017, Draft. In this draft the amended subsection was proposed as AMC 19.70.025A); CR 000963 (May 2, 2019, Draft); CR 001164 (January 2, 2021, Draft). Also see the helpful side-by-side comparison prepared by the City Attorney at CR 007177.

solely for clarification and to ensure that section 19.70.020 was consistent with the language in section 19.70.220 regarding GIS mapping.³⁸

But the deletion of the requirement that the maps are adopted by reference was not necessary to achieve consistency with AMC 19.70.220.³⁹ AMC 19.70.220 was silent on this question.⁴⁰ On the question of whether these amendments were only adopted for consistency and had already been part of the alternatives considered by the City, the Growth Management Hearings Board misinterpreted or misapplied the law violating RCW 34.05.570(3)(d).

³⁸ CR 007267.

³⁹ CR 001026 (July 20, 2017, Draft); CR 001096-97 (May 2, 2019, Draft); CR 001195-96 (January 2, 2021, Draft); CR 001296-97 (June 2, 2021, Draft); CR 001402-03 (Ordinance No. 3064, the adopted Critical Areas Ordinance update). Also see the helpful side-by-side comparison prepared by the City Attorney at CR 007176.

⁴⁰ CR 001026 (July 20, 2017, Draft); CR 001096-97 (May 2, 2019, Draft); CR 001195-96 (January 2, 2021, Draft); CR 001296-97 (June 2, 2021, Draft); CR 001402-03 (Ordinance No. 3064, the adopted Critical Areas Ordinance update).

Further, the Growth Management Hearings Board erred in stating that the “City introduced the concept of replacing adoptive maps with GIS mapping for wetlands in its first draft, presented to the public on July 20, 2017.”⁴¹ As was documented above, the Anacortes CAO drafts required adopting the Critical Areas Maps by reference in the July 20, 2017, May 2, 2019, and January 2, 2021 drafts.⁴² The Board’s conclusion is not supported by substantial evidence, or any evidence, violating RCW 34.05.570(3)(e).

D. Whether the wetland regulations protect critical areas and incorporate best available science (BAS). (Munce Issue 2)

The Growth Management Act (GMA) requires all cities and counties to designate critical areas and adopt development

⁴¹ CR 018521

⁴² CR 001005-06 (July 20, 2017, Draft. In this draft the amended subsection was proposed AMC 19.70.025A); CR 000963 (May 2, 2019, Draft); CR 001164 (January 2, 2021, Draft). Also see the helpful side-by-side comparison prepared by the City Attorney at CR 007177.

regulations that protect critical areas.⁴³ “‘Critical areas’ include the following areas and ecosystems: (a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas.”⁴⁴ Protecting critical areas means “maintaining existing conditions.”⁴⁵ “In short, under GMA regulations, local governments must either be certain that their critical areas regulations will prevent harm or be prepared to recognize and respond effectively to any unforeseen harm that arises.”⁴⁶ “[T]he GMA requires that the regulations for critical areas must

⁴³ RCW 36.70A.170(1)(d); RCW 36.70A.060(2).

⁴⁴ RCW 36.70A.030(6).

⁴⁵ *Swinomish Indian Tribal Cmty. v. W. Washington Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 430, 166 P.3d 1198, 1206 (2007), as corrected (Nov. 28, 2007), as corrected (Apr. 3, 2008).

⁴⁶ *Swinomish Indian Tribal Cmty.*, 161 Wn.2d at 436, 166 P.3d at 1209.

protect the “functions and values” of those designated areas.

[RCW 36.70A.172(1)] This means all functions and values.”⁴⁷

“Local governments must review and update their critical areas ordinances every eight years to ensure they continue to meet the GMA’s standards. RCW 36.70A.130(5)(b).”⁴⁸ RCW 36.70A.130(5) was subsequently amended to require ten-year updates to CAOs.

This Court has concluded that:

The GMA requires local governments to use “best available science” when designating and protecting critical areas. RCW 36.70A.172(1). “No precise definition of ‘best available science’ is found in the statutes or in case law, but the phrase is generally interpreted to require local governments to analyze valid scientific information in a reasoned process.” *Kitsap All. of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 160 Wn. App. 250, 267, 255 P.3d 696 (2011). The record must show that the County considered the best available science

⁴⁷ *Whidbey Env't Action Network v. Island Cnty.*, 122 Wn. App. 156, 174-75, 93 P.3d 885, 894 (2004).

⁴⁸ *Whidbey Env't Action Network v. Growth Mgmt. Hearings Bd.*, 14 Wn. App. 2d 514, 522-23, 471 P.3d 960, 966 (2020).

substantively in its designation and protection of a critical area. *Id.*⁴⁹

This court also concluded that:

The GMA “does not require the county to follow [best available science]; rather, it is required to include [best available science] in its record. Thus, a county may depart from [best available science] if it provides a reasoned justification for such a departure.” [*Ferry County v. Growth Mgmt. Hr'gs Bd.*, 184 Wn. App. 685, 740, 339 P.3d 478 (2014)] However, that “departure from [best available science] in a critical areas ordinance should be rare.” *Id.*⁵⁰

Further, WAC 365-195-920(1) and (2) provide: “Where there is an absence of valid scientific information or incomplete scientific information relating to a county’s or city’s critical areas, leading to uncertainty about which development and land uses could lead to harm of critical areas,” counties and cities should follow a “‘precautionary or a no risk approach’ ” to strictly limit development until the uncertainty is resolved and, as an interim approach, use “an effective adaptive management program that relies on scientific methods to evaluate how well regulatory

⁴⁹ *Whidbey Env't Action Network*, 14 Wn. App. 2d at 524, 471 P.3d at 967.

⁵⁰ *Id.*.

and nonregulatory actions achieve their objectives.”⁵¹

The City of Anacortes Critical Areas Ordinance

Revision/Update Best Available Science updates

recommendations report recommended that “[a]ll maps referenced in the CAO should be included as Appendices within the revised CAO.”⁵² The rationale for this best available science (BAS) recommendation is that “[t]his will provide city staff, the applicant and professional report preparer with the BAS.”⁵³

The amendments to AMC 19.70.020A that allow staff to amend these maps without the accuracy check provided by a public notice and an opportunity for the public to comment weakens the accuracy of the map and is inconsistent with this the City’s BAS.⁵⁴ This is inconsistent with the requirement that

⁵¹ *Whidbey Env't Action Network*, 14 Wn. App. 2d at 525, 471 P.3d at 967.

⁵² CR 003980.

⁵³ CR 003980.

⁵⁴ CR 003980, CR 003974-94.

BAS be substantially incorporated into the CAO.⁵⁵ So the Board's conclusion that "[t]he City subsequently adopted an ordinance that incorporated all of the recommendations of each of these and other sources of BAS" is not supported by substantial evidence violating RCW 34.05.570(3)(e).⁵⁶

V. CONCLUSION

For the reasons argued above, this Court should conclude that the adoption of the Anacortes Critical Areas Ordinance violated the public participation requirements of the GMA and did not incorporate BAS. The Board's decisions to the contrary should be remanded back to the Board.

This document contains 3,445 words, excluding the parts of the document exempted from the word count by RAP 18.17.

⁵⁵ *Whidbey Env't Action Network*, 14 Wn. App. 2d at 524, 471 P.3d at 967.

⁵⁶ CR 018517.

Respectfully submitted on this 24th day of February 2023.

FUTUREWISE

s/ Tim Trohimovich

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 24th day of February 2023, he, she, or they caused the following document to be served on the persons listed below in the manner shown:
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FUTUREWISE

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